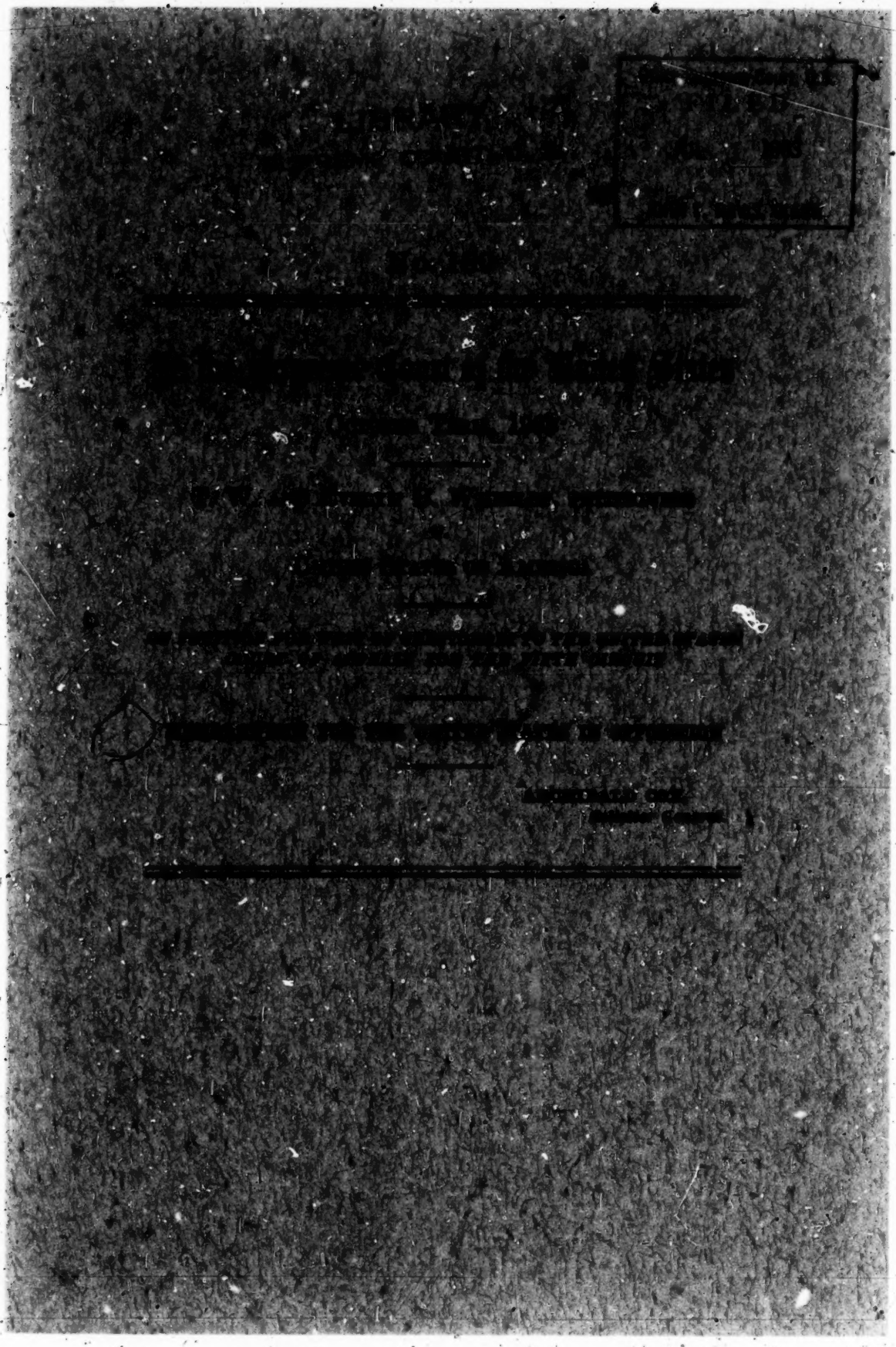

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 180

T. W. AND EVELYN B. WHEELER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The judgment of the court of appeals was entered on December 11, 1962. A petition for rehearing was denied on February 27, 1963. No extension of time for filing a petition for certiorari was granted, and the 90-day period for filing expired on May 28, 1963. The petition was filed on June 1, 1963, and is accordingly out of time. 28 U.S.C. 2101(c).

2. The petition in any event presents no question warranting review. The petitioner entered into a contract to sell for $1 million his controlling stock interest in three corporations. Upon discovering that under the terms of the contract the buyer was not personally liable for the purchase price, the petitioner refused

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to perform. The buyer brought suit for specific performance. After preliminary proceedings, the petitioner settled the suit by paying the buyer $54,675. Immediately following the settlement of the suit, the petitioner sold the stock to another purchaser.

On his income tax return for 1953, petitioner claimed a deduction for the $54,675 paid in settlement of the suit (plus $1,965 in legal expenses) as "ordinary and necessary expenses paid or incurred * * * for the management, conservation, or maintenance of property held for the production of income" under § 23(a)(2) of the Internal Revenue Code of 1939. The court of appeals, reversing the district court, held that the amounts expended in defending and settling the suit were capital expenditures to be added to the petitioner's basis for the stock rather than current business expenses.

The decision below is clearly correct. That the buyer sought a temporary receivership of the corporation pending determination of the suit, and that a receivership might have injured the business by impairing its credit, is irrelevant. The characterization of the costs of resisting or settling a claim depends upon the source and nature of the claim, not the injurious consequences threatened by its assertion. *United States* v. *Gilmore*, 372 U.S. 39. Here the claim arose from petitioner's efforts to sell his stock, a capital asset, on the best terms available. By avoiding his contract with the initial buyer, and settling the resulting suit, petitioner was able then to sell the stock on more favorable terms. And not only did the claim

arise from a sale transaction, but in its nature the claim was an assertion of equitable title to the stock. Whether the expenditures be viewed as a cost of defending the petitioner's "title" to the stock, as a cost essentially of "reacquiring" the stock in order to permit a more advantageous sale, or simply as a cost of selling the stock (viewing the aborted sale and the completed sale as but parts of a single undertaking to dispose of the stock on the best terms available), they are properly to be recovered as an offset against the ultimate sales proceeds produced by them. In no sense do they represent the "current" costs of holding property for the production of income.

There is in any event no conflict of decisions and no other ground for certiorari. The petition should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JULY 1963.

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